No. 90-252

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CLERK

In The

Supreme Court of the United States

October Term, 1990

FERDINAND DREXEL INVESTMENT CO., INC.,
VERNON F. ALIBERT, Individually, &
VERNON F. ALIBERT, on behalf of:
COLUMBIA RESEARCH LABORATORIES, INC.,
ALIBERT INDUSTRIES, INC., and
ALIBERT PROPERTIES, INC.,

Petitioners,

v.

VICTOR F. ALIBERT, OLIVE E. ALIBERT,
COLUMBIA RESEARCH LABORATORIES, INC.,
ALIBERT INDUSTRIES, INC.,
ALIBERT PROPERTIES, INC., and
COLUMBIA RESEARCH LABORATORIES, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Was the judgment entered against Petitioners on their securities law claims in conflict with the decisions of this Court regarding the issues of reliance and materiality?

2. Did the lower court properly determine that Petitioners could not establish the elements of mail fraud?

3. Was the judgment entered against Petitioners on their RICO claims in conflict with the decisions of this Court regarding the pattern requirement?

4. Did the Court properly consider the claims of Petitioner Ferdinand Drexel Investment Co., Inc.?

PARTIES TO THE PROCEEDING

All parties to the proceeding appear in the caption of the case.[1]

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[1] Rule 29 Notice: There are no parent companies or subsidiaries.

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STATUTES INVOLVED

PENNSYLVANIA BUSINESS CORPORATION LAW

Act of May 5, 1933, P.L. 364, as amended

Section 908. *Rights of Dissenting Shareholders.* – A. If any shareholder of a domestic corporation which becomes a party to a plan of merger or consolidation shall object to such plan of merger or consolidation and shall comply with the provisions of section 515 of this act, such shareholder shall be entitled to the rights and remedies of dissenting shareholders therein provided, if any.

Section 515. *Rights of Dissenting Shareholders.* – A. If any shareholder of a business corporation objects to any proposed plan of action of such corporation authorized under any section of this act, and such section provides that such shareholders shall be entitled to the rights and remedies of dissenting shareholders, such shareholders shall be entitled to the following rights and remedies:

B. If any shareholder of a business corporation shall file with such corporation, prior to the commencement of the voting by shareholders upon the plan at the meeting of shareholders at which a plan is submitted to a vote, a written objection to such plan, and shall not vote in favor thereof, and such shareholder, within twenty days after the date on which the vote approving the plan was taken, shall also make written demand on the corporation, or the surviving or new corporation resulting from the plan, for the payment of the fair value of his shares, such corporation shall pay to such shareholder the fair value of his shares as of the day prior to the date on which the vote was taken without regard to any depreciation or

appreciation thereof in consequence of the plan upon surrender of the share certificate or certificates representing his shares. Neither a proxy nor a vote against the plan shall constitute such a written objection. The demand of the shareholder shall state the number and class and series, if any, of the shares owned by him with respect to which he dissents. A dissenting shareholder may dissent as to all or less than all of those shares registered in his name of which he is not the beneficial owner, but there may not be dissent with respect to some but less than all shares of the same class or series owned by any given beneficial owner of shares whether or not the shares so owned by him are registered in his name. Unless a shareholder files such written objection and also makes such demand within the twenty-day period, he shall be conclusively presumed to have consented to the plan, and shall be bound by the terms thereof. Any shareholder making such demand shall thereafter be entitled only to payment as in this section provided and shall not be entitled to vote or to exercise any other rights of a shareholder as to the shares with respect to which he dissents.

C. No such demand may be withdrawn unless the corporation shall consent thereto. If, however, such demand shall be withdrawn upon consent, or if the proposed plan shall be abandoned or rescinded, or the shareholders shall revoke the authority to effect such plan, or if no demand or petition for the determination of fair value by a court shall have been made or filed within the time provided in this section, or if a court of competent jurisdiction shall determine that such shareholder is not entitled to the relief provided by this section, then the right of such shareholder to be paid the fair value of his

shares shall cease and his status as a shareholder shall be restored retroactively without prejudice to any corporate proceedings which may have been taken during the interim.

D. Within thirty days after such plan became effective, the corporation or, in the case of a merger or consolidation, the surviving or new corporation, domestic or foreign, shall give written notice thereof to each dissenting shareholder who has made demand as herein provided, and shall make a written offer to each such shareholder to pay for such shares at a specified price deemed by such corporation to be the fair value thereof. Such notice and offer shall be accompanied by a balance sheet of the corporation as of the latest available date and not more than twelve months prior to the making of such offer, and a profit and loss statement of such corporation for the twelve months' period ended on the date of such balance sheet.

E. If, within sixty days after the date on which such plan became effective, the fair value of such shares is agreed upon between any such dissenting shareholder and the corporation, payment therefor shall be made within ninety days after the date on which such plan became effective, upon surrender of the certificate or certificates representing such shares. Upon payment of the agreed value, the dissenting shareholder shall cease to have any interest in such shares.

F. A dissenting shareholder who is unable to agree with the corporation on the fair value of his shares may demand proceedings to value his shares at any time after sixty days and within ninety days after the date on which

the plan became effective. Within thirty days after receipt of any such written demand, the corporation shall, or at its election at any time after sixty days and within ninety days after the effective date the corporation may, file a petition in the court of common pleas in the county in this State where the registered office of the corporation is located, praying that the fair value of such shares be found and determined. If in the case of a merger or consolidation, the surviving or new corporation is a foreign corporation without a registered office in this State, such petition shall be filed in the county where the registered office of the domestic corporation was last located, which county shall be deemed to be the county where the cause of action arose and all process shall be served upon such foreign corporation as provided in section 1011 of this act. If the corporation has not instituted the proceeding as herein provided, any dissenting shareholder may do so in the name of the corporation at any time within thirty days after the expiration of such ninety day period. All dissenting shareholders, wherever residing, shall be made by the corporation parties to the proceeding as an action against their shares quasi in rem. A copy of the petition shall be served on each dissenting shareholder who is a resident of this State and shall be served personally or by registered or certified mail on each dissenting shareholder who is a nonresident. The jurisdiction of the court shall be plenary and exclusive. All shareholders who are parties to the proceeding shall be entitled to judgment against the corporation for the amount of the fair value of their shares as of the day prior to the date on which the vote was taken without regard to any depreciation or appreciation thereof in consequence of the plan.

The court may, if it so elects, appoint one or more persons as appraisers to receive evidence and recommend a decision on the question of fair value. The appraisers shall have such power and authority as shall be specified in the order of their appointment or an amendment thereof. The judgment shall be payable only upon, and concurrently with, the surrender to the corporation of the certificate or certificates representing such shares. Upon payment of the judgment, the dissenting shareholder shall cease to have any interest in such shares.

G. The judgment shall make due allowance for any distribution to the shareholders between the day before the date of the vote on the plan and the date of their demand for the fair value of their shares, and for such interest as the court may find to be fair and equitable in all the circumstances.

H. The costs and expenses of any such proceeding shall be determined by the court and shall be assessed against the corporation, but all or any part of such costs and expenses may be apportioned and assessed, as the court may deem equitable, against any or all of the dissenting shareholders who are parties to the proceeding to whom the corporation shall have made an offer to pay for the shares, if the court shall find that the action of such shareholders, in failing to accept such offer, was arbitrary or vexatious or not in good faith. Such expenses shall include reasonable compensation for and reasonable expenses of the appraisers, but shall exclude the fees and expenses of counsel for, and experts employed by any party, but if the fair value of the shares, as determined, materially exceeds the amount which the corporation offered to pay therefor, or if no offer was made, the court

in its discretion may award to any shareholder who is a party to the proceeding such sum as the court may determine to be reasonable compensation to any expert or experts employed by the shareholder in the proceeding.

I. Within twenty days after demanding payment for his shares, each shareholder demanding payment shall submit the certificate or certificates representing his shares to the corporation for notation thereon that such demand has been made. His failure to do so shall, at the option of the corporation, terminate his rights under this section unless a court of competent jurisdiction, for good and sufficient cause shown, shall otherwise direct. If shares represented by a certificate on which notation has been so made shall be transferred, each new certificate issued therefor shall bear similar notation, together with the name of the original dissenting holder of such shares and a transferee of such shares shall acquire by such transfer no rights in the corporation other than those which the original dissenting shareholder had after making demand for payment of the fair value thereof.

J. Shares acquired by a corporation pursuant to payment of the agreed value therefor, or to payment of the judgment entered therefor, as in this section provided, may be held and disposed of by such corporation as in the case of other treasury shares, except that, in the case of a merger or consolidation, they may be held and disposed of as the plan of merger or consolidation may otherwise provide.

K. Any shareholder who desires to object to or to dissent from any proposed plan authorized under any

section of this act and where this act provides that shareholders so objecting or dissenting shall have the rights and remedies herein provided, shall be limited to the rights and remedies prescribed under this section, and the rights and remedies prescribed by this section shall be exclusive.

L. Except as otherwise provided in subsection M of this section or in the articles or in the resolution of the board of directors submitting a proposed plan of action to the shareholders, this section shall not apply (1) to the shares of any class, which, at the record date fixed to determine the shareholders entitled to notice of and to vote at the meeting at which the plan is to be acted on, or on the date of such meeting, if no record date has been fixed, are either (i) listed on the New York Stock Exchange or the American Stock Exchange, or (ii) held of record by not less than two thousand five hundred shareholders; nor (2) to any of the shares of a corporation which is a party to a plan of merger if, pursuant to section 902.1 of this act, the plan does not require the approval of the shareholders of such corporation.

M. Clause (1) of subsection L of this section shall not apply to:

(1) An amendment to which section 810 of this act is applicable.

(2) Shares converted by a plan, if such shares are not converted solely into shares of the acquiring, surviving, new or other corporation or solely into such shares and cash in lieu of fractional shares; and

(3) Shares of any preferred or special class, unless the articles or the plan entitles all shareholders of such class to vote thereon and requires for the adoption of the plan the affirmative vote of shareholders of such class entitled to cast at least a majority of the votes which all shareholders of such class are entitled to cast thereon.

STATEMENT OF THE CASE

A. Procedural Posture

This is an action brought by a disgruntled minority shareholder in a closely held family business who refused to accept or read notices sent to him regarding a corporate reorganization and who now complains that the accomplishment of the reorganization, exactly as described in the notices he intentionally ignored, constitutes securities fraud under the Securities Exchange Act of 1934, 15 U.S.C. § 78; and Rule 10b-5, 17 C.F.R. § 240.10b-5, and a violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1962 *et seq*. In a thorough, well reasoned opinion, the United States District Court for the Eastern District of Pennsylvania rejected Petitioners' attempt to strain federal law to fit the circumstances of this case, granted judgment for defendants on the federal claims asserted[1], and relegated plaintiffs to the state court for any available

[1] Petitioners' Statement of Questions Presented implies that the securities and RICO claims were dismissed. In fact, judgment on these claims was entered against Petitioners and in favor of Respondents.

causes of action under state law.[2] *Ferdinand Drexel Investment Co., Inc. v. Alibert*, 723 F.Supp. 313 (E.D.Pa. 313). The United States Court of Appeals for the Third Circuit affirmed, without opinion, commenting only that it found no basis for plaintiffs' vituperative contention that the District Judge was biased against them. 904 F.2d 694 (3d Cir. 1990).

B. Statement of Facts

Columbia Research Laboratories, Inc., Alibert Industries, Inc., and Alibert Properties, Inc. (collectively "Respondents" or "Columbia Research") are closely held business corporations. For many years, Vernon Alibert ("Vernon"), Victor Alibert and Olive Alibert owned all of the stock of Columbia, with the exception of a small amount owned by loyal employees. In 1981, after disagreements among the shareholders, Vernon ceased active employment with Columbia Research but continued to accept a substantial salary. (8a-10a). Despite remaining an officer and director, Vernon's loyalty to the best interests of the family business eroded. He engaged in various schemes and maneuvers to damage Columbia Research, including attempts to sabotage the state and federal "S" tax status of the business by purportedly transferring some of his stock to Ferdinand Drexel Investment Co., Inc., a corporate entity which, according to the District Court, does not appear to have any separate

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[2] Petitioners filed a Complaint in the Court of Common Pleas of Delaware County, Pennsylvania in July, 1990 asserting various common law and statutory causes of action, including breach of fiduciary duty and fraud.

identity from Vernon. The attempt to destroy the "S" status resulted in the payment of significantly higher corporate income taxes and impeded the marketability of the business. While Vernon accepted his salary, he refused all correspondence sent to him and ignored all other efforts to communicate with him. (12a).

In April, 1988, Victor and Olive determined that because of Vernon's disruptions, the futility of efforts to communicate with him, and the need to stabilize corporate ownership, the continued viability of Columbia Research and the related corporations required that they reorganize the companies and buy out Vernon's stock. In accordance with the Pennsylvania Business Corporation Law, Plans and Agreements of Merger for the corporations were presented to and approved by the shareholders and Boards of Directors and were approved. The reorganization was accomplished by the creation of new corporations, Olvic Laboratories, Inc., Olvic Industries, Inc., and Olvic Properties, Inc., the shareholders of which were identical to the shareholders of the respective original corporations, with the exception of Vernon. The new corporations merged with their counterparts, with an exchange of stock and a cash price for Vernon's interest in each corporation. The total payment to Vernon for his stock in the three corporations was in excess of $2 million to be paid with interest over four years. (13a-15a).

As required by the Pennsylvania Business Corporation Law, Vernon was notified by mail of the meetings of the Boards of Directors and the shareholders of the three corporations to consider the proposed mergers. Notices were sent by certified mail, return receipt requested, and by regular mail. Vernon refused the notices mailed by

certified mail and returned, apparently unopened, the notices mailed by regular mail.[3] The notices, nevertheless, completely satisfied the requirements of the Pennsylvania Business Corporation Law. These notices included advice to shareholders, as required by the statute, 15 P.S. § 1902B, regarding their right to dissent from the merger and obtain an independent determination of the value of their stock if they were dissatisfied with the price being offered pursuant to 15 P.S. §§ 1515 and 1908. Vernon chose not to read the notices given to him and did not exercise his dissenter's rights. By his inaction, he chose, instead, to accept the consequences of the corporate action that he insisted on ignoring. (15a-16a).

Columbia Research and the related corporations proceeded with the mergers and completed the transactions as of May 4, 1988. Rather than accept the initial payments of more than $500,000 and total payments of more than $2 million for his stock as provided in the Agreements of Merger, Vernon commenced this litigation. Despite his ceaseless efforts to destroy the corporations, the payments now due him for his stock are available in a special account established by the corporations. (17a).

Vernon, to date, has been thwarted in his effort to destroy Columbia Research. The lower court recognized that Victor and Olive did not engage in any fraudulent activity. They sought to advise Vernon of exactly what

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[3] Petitioners contend that, "The proofs of mailing showed that Vernon Alibert had never received the notices . . . " The record demonstrates, however, and the District Court found that the notices did, indeed, reach Vernon Alibert. He refused to accept the notices.

they intended to do and then proceeded to do it. The lower court recognized that Vernon's own actions in refusing the notices sent to him were the cause of any supposed damage he may have sustained. The Court of Appeals affirmed this determination. Unable to accept the relegation of his claims to state court, Vernon now seeks a writ of certiorari to the United States Court of Appeals for the Third Circuit. Vernon's arguments do not, however, present conflicts or contentions which are appropriate for review by this Court.

REASONS FOR DENYING THE WRIT

I. The Judgment Entered Against Petitioners on Their Securities Law Claims Does Not Conflict with the Decisions of This Court Regarding The Issues of Materiality and Reliance

The District Court, relying solely on the allegations of Petitioners' Complaint and their submissions in response to the Motion to Dismiss or, in the Alternative, for Summary Judgment, (7a-8a) determined that the Plans and Agreements of Merger challenged by Petitioners do not contain misrepresentations of material facts or material omissions; that Petitioners did not rely and could not have relied on any alleged misrepresentations; and that there was no causal connection between the alleged misrepresentations and omissions and the harm Petitioners claim to have suffered. In short, the District Court determined that Petitioners failed to satisfy a single element of a cause of action for securities fraud and entered judgment against them. (21a-31a).

Despite this complete repudiation of their claim, Petitioners seek review by this Court based only on their continuing refusal to accept or understand the lower court's proper holding that reliance is a required element in a securities fraud action alleging omissions of material facts in a securities transaction. Petitioners' attempt to eliminate reliance as an element of a 10b-5 claim is simply untenable.

In *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128 (1972) defendants were stock transfer agents accused of misrepresenting to potential sellers the value of their stock certificates in a corporation organized to manage the assets of the Ute Indians. This Court held:

> Under the circumstances of this case, involving primarily a failure to disclose, positive proof of reliance is not necessary. All that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in the making of this decision.

Id. 406 U.S. at 153-154. *Affiliated Ute* thus held only that under certain circumstances, when omitted information reasonably could have influenced an investment decision, reliance would be inferred; it did not, however, dispense with reliance as an element of a cause of action under Rule 10b-5, or authorize a securities fraud action in a case in which reliance is indisputably impossible. As recognized by the District Court, the case before the Court does not concern a hypothetical "reasonable investor" or a large class of investors in a public company. Instead, this case concerns one specific investor trying to now evade his own self-imposed ignorance. The undisputed fact is that Vernon *refused to read* the merger notices which

he acknowledges were properly mailed to him. Any inference of reliance after such refusal would be unjustified as a matter of law and ludicrous as a matter of common sense. *Zoltnick v. TIE Communication*, 836 F.2d 818 (3rd Cir. 1988).

If any doubts remained about the vitality of the reliance requirement in 10b-5 cases after *Affiliated Ute*, they were eradicated by the subsequent Supreme Court decision in *Basic Incorporated v. Levinson*, 485 U.S. 224 (1988), stating, 485 U.S. at 243:

> We agree that reliance is an element of a Rule 10b-5 cause of action . . . Reliance provides the requisite causal connection between a defendant's misrepresentation and a plaintiff's injury.

The District Court recognized, based on Petitioners' pleadings, that Vernon would have objected to the mergers no matter what information was provided to him. No specific bit of information would have been material to Vernon because of his pre-determined objection to the merger, regardless of the information. The simple fact is that Vernon, by refusing to open and read his mail, rendered himself ignorant of the acts to which he now objects. He neither relied nor would have relied on any information contained or which could have been contained in the Plans and Agreement of Merger beyond the fact of the transaction itself and the price established for his stock. Thus, the District Court properly held that Vernon could not satisfy, by his pleadings and submissions, the reliance requirements of a securities fraud action. This determination does not conflict with *Affiliate Ute* or *Basic* and there is no reason for this court to review the determination.

II. The District Court Properly Dismissed The Mail Fraud Claims

Petitioners seek review of the District Court's dismissal of their mail fraud claims. To the extent this contention seeks to resurrect an independent cause of action for mail fraud, the simple response set forth by the District Court is that mail fraud is a criminal offense, not a civil cause of action. (33a). If Petitioners assert that the lower court improperly held the mail fraud claims insufficient as the predicate acts for their RICO claim, the contention is untenable based on the lower court's determination that there was no intent to defraud:

> Since the notices told plaintiff Vernon Alibert what the defendant intended to do, and when they intended to do it, as well as what he needed to do to protect himself in the event that he disagreed with the terms of the merger, and considering that the defendants in fact did exactly what they said they would do, the notices were not fraudulent on their face. (37a).

The lower court also concluded that there were no material omissions from the Plans and Agreement of Merger and that the omitted information would have had no impact on the decision of a reasonable investor in Petitioners' position on whether to exercise dissenters' rights. Thus, based on the Complaint and Petitioners' submissions to the Court, the mailings neither contained material misrepresentations nor omitted material facts, and, therefore, mail fraud is not established.

Petitioners' complain to this Court that the District Court did not blindly accept their conclusory allegations of mail fraud as established fact. The lower court was not

required to adhere to conclusions which Petitioners did not and could not support by factual allegations and evidence. *Celotex Corp. v. Catrett*, 477 U.S. 327 (1986). It could and did draw its own legal conclusions based on the facts of record and properly determined that the facts did not satisfy the statutory elements of mail fraud.

III. The Judgment Entered Against Petitioners on Their RICO Claims Does Not Conflict With the Decisions of This Court Regarding the Pattern Requirement

The District Court determined, as demonstrated above, that Petitioners could not prevail on their RICO claim because they could not establish the requirements of mail fraud. In addition, the lower court found an insufficient number of mailings to satisfy the continuity and pattern requirement set forth by this Court in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985) and *H.J., Inc. v. Northwestern Bell Telephone Company*, ___ U.S. ___, 109 S.Ct. 2893, 106 L.Ed. 2d 195 (1989). The Court also concluded that Petitioners' litany of "illegal acts" might, at most, state causes of action under Pennsylvania law, but does not constitute "racketeering activity" under RICO. In summary, the lower court held that Petitioners could not satisfy the requirements for a RICO cause of action:

> I find that the allegations of the Complaint, as supported by plaintiffs' Response and exhibits, do not sufficiently allege the necessary elements of security fraud or mail fraud. I further find that, by reason of the refusal of plaintiff Vernon Alibert to accept delivery of the notices, the necessary causal nexus for a cause of action under RICO, in addition to not being alleged, is

> rendered impossible. I further find that assuming, *arguendo*, that securities fraud, mail fraud and causal nexus had been sufficiently alleged, the allegations of securities fraud and mail fraud do not meet the pattern requirement of RICO as set forth in *Sedima and H.J., Inc., supra*. Without the necessary pattern of racketeering activity and causal nexus, there is no cause of action under RICO. (51a).

Petitioners focus only on the Court's determination that the pattern requirement for a RICO claim is not satisfied. The lower court thoroughly addressed this issue and concluded, even after accepting all of the Petitioners' conclusory allegations of illegality as true, that there were only two mailings in furtherance of defendants' purpose. The mailings were made within a single month with the object of consummating a corporate merger early in the following month. These acts clearly fall within the limits defined by this Court in *H.J., Inc.*:

> A party alleging a RICO violation may demonstrate continuity over a closed period proving a series of related predicates extending over a substantial period of time. Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement. 106 L.Ed.2d at 209.

Thus, the lower court properly applied the decisions of this Court in determining that the pattern requirement was not satisfied by these limited acts and that a RICO cause of action could not be established.

IV. The Claims of Ferdinand Drexel Investment Co., Inc. Were Fully and Properly Considered

The lower court did not summarily dismiss Ferdinand Drexel's claims as Petitioners contend. It did not improperly determine that Ferdinand Drexel was not a minority shareholder of the corporations at the time of the merger or that Ferdinand Drexel was not a legitimate plaintiff. The District Court, rather, recognized that the Plans and Agreements of Merger accounted for all of the stock alleged to be owned by Vernon Alibert *and* Ferdinand Drexel. Because Ferdinand Drexel was not, as admitted in the Complaint, a registered owner on the books of the original companies, it has no independent federal securities or RICO claims. The lower court simply held that Ferdinand Drexel's rights and causes of action were identical to those of Vernon and had to be vindicated through Vernon as the registered owner of the stock.

The District Court accepted Petitioners' allegations that Vernon transferred stock to Ferdinand Drexel. It also accepted the allegations that Ferdinand Drexel was not a registered shareholder. Thus, the lower court did not summarily dismiss Ferdinand Drexel's contentions, it simply considered them in their proper context.

CONCLUSION

Based on the foregoing arguments and authorities, Respondents respectfully submit that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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